UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONALD MARSHALL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 02-1298 (RMC)**
	)	
D.C. CARIBBEAN CARNIVAL, INC.	)	
***and* SHEPPARD EXPRESS, INC.,**	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Plaintiff Ronald Marshall was injured after falling from an eighteen-wheel tractor-trailer while a spectator at the 2001 D.C. Caribbean Carnival Parade ("Parade"). He filed suit against D.C. Caribbean Carnival, Inc. ("DCCC"), the organizer of the Parade, and Sheppard Express, Inc. ("Sheppard"), the owner and operator of the tractor-trailer.

After full discovery, Defendants filed motions for summary judgment. The parties also filed cross-motions to strike expert witnesses. The briefs raise a number of salient questions. The answers to three of these questions dispose of this case: (1) Are expert witnesses necessary and have the parties proffered true experts? (2) Was there any contributory negligence on Mr. Marshall's part that would bar his recovery under D.C. law? (3) Did Defendants have the "last clear chance" to avoid injury to Mr. Marshall?[1]

[1] Both defendants also argue that summary judgment can be granted in their favor because Mr. Marshall was a trespasser to whom they owed only a duty to avoid wanton risk. Mr. Marshall asserts that he was an invitee, as the Knock Boyz DJ invited members of the public to climb up onto the float. This fact issue cannot be determined on summary judgment.

The Court finds that expert testimony is necessary, but Mr. Marshall has failed to proffer a qualified expert to prove essential elements of his cause of action against Sheppard. Furthermore, Mr. Marshall's contributory negligence bars any recovery against DCCC. Finally, because there was no viable opportunity to warn Mr. Marshall of the danger, DCCC did not have the last clear chance to avoid the injury. For these reasons, Defendants' motions for summary judgment will be granted and the case dismissed.

BACKGROUND FACTS

On June 23, 2001, Mr. Marshall and a group of friends attended the 2001 D.C. Caribbean Carnival Parade. The Parade is part of an annual, weekend-long event held in Washington, D.C.[2] According to Mr. Marshall, the Parade, and similar events, are "raucous cultural celebrations" that differ from traditional parades because maximum audience participation is encouraged and expected, attendees are not kept away from the floats, streets are open to pedestrians, and laws on public consumption of alcohol are not enforced. *See* Pltf.'s Opp. to Mot. for Sum. Judg. at 14.[3] The 2001 Parade attracted hundreds of thousands of spectators and participants. It involved numerous troupes of people dressed in masquerade and eighteen-wheel flatbed trucks (floats) on which live bands or disc jockeys played loud and boisterous music. *See id*.[4]

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[2] Mr. Marshall has attended similar events in Washington, D.C., New York, New Jersey, Boston and Miami.

[3] The facts are taken from Plaintiff's brief or are not contested except where noted. The Court has not relied upon the many "fact" assertions in Plaintiff's brief that are not supported by record evidence.

[4] *See* DCCC Mot. for Sum. Judg. at 10 ("In 2001, there were approximately 15-20 bands in the parade . . . Each band was made up of at least 20 masqueraders who participated in the parade.") (internal citations omitted).

Mr. Marshall indicates that it is customary for spectators to follow individual floats throughout such parades. *Id.* at 15; Sheppard Mot. for Sum. Judg. Exh. 3 (Marshall Dep.) pp. 36-37. At the 2001 Parade, Mr. Marshall and his friends followed a float on which a group called the "Knock Boyz" was performing. The Knock Boyz is a troupe of people who perform and dance to music played by a DJ. Opp. at 16; Sheppard Mot. for Sum. Judg. Exh. 10 (Sargeant Dep.) p. 40. People who wanted to join the troupe paid a fee in exchange for a costume. *Id*. Mr. Marshall did not pay to join the Knock Boyz.

The Knock Boyz rented a truck and flatbed trailer from Sheppard. *Id.* The driver of the truck, Christopher Bennett, was also affiliated with Sheppard. The Knock Boyz provided six spotters around the truck. Sheppard Mot. for Sum. Judg. Exh. 7 (Bennett Dep.) pp. 40-41. These spotters were employed to help ensure the safe operation of the float during the Parade.

Some people got on and off the Knock Boyz trailer during the Parade. Mr. Bennett identified these people as "part of the parade, the family members, friends [of the troupe] and some children who were tired and could not walk no more." Bennett Dep. p. 96. Mr. Bennett was informed each time someone needed to get on or off the trailer by a spotter, the disc jockey who was on the trailer, or by the passenger who traveled with him in the cab, Brian Williams. *Id.* p. 99; Sheppard Mot. for Sum. Judg. Exh. 8 (Davidson Dep.) p. 12.

Although DCCC stated in its advertisements that no alcohol would be sold at the Parade, the audience – which numbered in the hundreds of thousands along Georgia Avenue – obtained alcohol during the course of the Parade. Mr. Marshall was no exception. He consumed the equivalent of six alcoholic drinks during the Parade. *See* Marshall Dep. pp. 53, 56. Indeed, he drank enough alcohol to register a blood alcohol content of 0.10 percent when admitted to the

hospital. Mr. Marshall also had perceptible amounts of amphetamines, propoxyphene and marijuana in his blood at that time. *See* DCCC Mot. for Sum. Judg. Exh. 4, pp. 54-55.

After drinking, and with various drugs in his system, Mr. Marshall then attempted to climb aboard the Knock Boyz trailer in an area between the tractor and trailer.[5] Mr. Marshall testified in his deposition that he had mounted this particular float two times prior to the accident.[6] However, at least on this third attempt, he did not know how long the float would remain stopped. Marshall Dep. p. 92. He also did not know whether the driver could see him. *Id.* at 50.

In fact, Mr. Bennett did not know that Mr. Marshall was attempting to get on the float. He could not see the area of the float between the tractor and the trailer without physically getting out of the tractor, *id.* p. 70, and there was no adjustment that he could have made to his mirrors that would have allowed him to see between the tractor and the trailer. Bennett Dep. p. 79. Although Mr. Williams got out of the tractor to examine the area on the right (passenger) side of the vehicle prior to the float's departure, *Id.* p. 121, he did not see Mr. Marshall attempting to board the trailer. In addition, Officer Robert Hay of the D.C. Metropolitan Police Department was working

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[5] Mr. Marshall testified in deposition that he had heard the DJ on the flatbed invite members of the audience on the street to board the float about 30-45 minutes prior to the incident in question and at a different place along the parade route. Marshall Dep. pp 119-20. That was the single occasion on which he says that he heard such an invitation. *Id.* Defendants deny any such invitation was issued and there is deposition testimony from other witnesses, challenging Mr. Marshall's recollection. For purposes of this decision, the Court assumes that the DJ did, on one occasion along the parade route but at another time and place, invite observers to climb aboard.

[6] This testimony was contradicted by the members of his party, all of whom testified that Mr. Marshall never climbed onto the float at any earlier point in the day. *See* Sheppard Mot. for Sum. Judg. Exh. 4 (Sam Dep.) pp. 23, 28-29; Exh. 5 (Noel Dep.) pp. 31, 47; Exh. 6 (Hosten Dep.) p. 23. This discrepancy is not relevant to disposition of the pending motions and the Court assumes for these purposes that Mr. Marshall's recollection is correct.

in the area, using his bicycle to keep the crowd back from the floats. Sheppard Mot. for Sum. Judg. Exh. 13 (Hay Dep.) p. 16. Although Officer Hay encountered Mr. Marshall that same day, at the time of the injury, Officer Hay had his back to the float and did not see Mr. Marshall attempting to board it.

Around the time Mr. Marshall attempted to climb aboard, a police officer approached the float and instructed Mr. Bennett to park it. Bennett Dep. p. 121. The officer motioned for Mr. Bennett to blow his horn and move the float forward. *Id.* p. 125.[7] Mr. Bennett released the brake, then heard a scream. *Id.* pp. 125-126.

Mr. Marshall had become trapped under the rear wheel and dragged under the truck. Apparently, he had placed his foot on a step between the truck and the trailer and, as he did so, the truck moved forward and he lost his balance. Pltf.'s Opp to Mot. for Sum. Judg. at 18-19. Specifically, Mr. Marshall contends:

> Plaintiff Ronald Marshall was standing behind one of his friends Sherwyn Garvin, who had stepped up onto the flatbed. Plaintiff Marshall, attempting to follow his friend onto the flatbed, placed his foot onto the single metal step located between the flatbed and cab of the truck on the passenger side of the truck. As Plaintiff Ronald Marshall placed his foot onto the metal step and was in the process of pulling himself up, defendant Sheppard's 18-wheeler truck started to move which caused Plaintiff to fall. At this time, plaintiff began to yell for the driver of the truck to stop, however the driver failed to stop. Defendant Sheppard's truck ran over the Plaintiff's foot pulling him under the flatbed truck and rolled over him. People in the crowd began to yell and scream for the driver to stop. The driver only stopped when a police officer waved down the truck driver to stop. Plaintiff Ronald Marshall had suffered massive crush injuries.

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[7] Mr. Bennett says that he did so. Mr. Marshall heard no horn and argues that no warning was given that the truck was about to move. For purposes of ruling on the summary judgment motions, the Court accepts Mr. Marshall's version of events.

Sheppard Mot. for Sum. Judg. at 2 (quoting Plaintiff's answer to Sheppard's Interrogatory No. 5). When asked why he tried to climb up onto the float, Mr Marshall responded that "[e]verybody was doing it. And I didn't think it was unsafe." Marshall Dep. p. 89.

MOTIONS TO STRIKE EXPERTS

DCCC has proffered two experts, J. Barkley Russell and Jerry V. Wilson, to testify as to the standard of care for parade organizers and police policies and procedures for parades. Mr. Marshall has proffered Paul Wertheimer as an expert to testify as to the appropriate safety procedures that should be followed during public assembly events.

A. *Are Experts Necessary?*

"'The plaintiff in a negligence action bears the burden of proof on three issues: the applicable standard of care, a deviation from that standard by the defendant, and a causal relationship between that deviation and the plaintiff's injury.'" *Hill v. Metro. African Methodist Episcopal Church*, 779 A.2d 906, 908 (D.C. 2001) (quoting *Levy v. Schnabel Found. Co.*, 584 A.2d 1251, 1255 (D.C. 1991)). Further, a "'plaintiff must put on expert testimony to establish what the standard of care is if the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson.'" *Id.* (quoting *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 433 (D.C. 2000)). No expert is needed if "'the subject matter is within the realm of common knowledge and everyday experience.'" *Id.*[8]

[8] A federal district court sitting in diversity looks to the substantive law of the local jurisdiction to determine whether expert testimony is relevant or necessary in a negligence action. *See, e.g.*, *Parker v. Grand Hyatt Hotel*, 124 F. Supp. 2d 79, 89-90 (D.D.C. 2000) (examining District of Columbia law to determine whether expert testimony was necessary). *Accord Hemingway v. Ochsner Clinic*, 722 F.2d 1220, 1225 n.10 (5th Cir. 1984) (federal courts sitting in diversity should apply the state rule to fully realize state substantive policy).

Throughout the last decade District of Columbia courts have required expert testimony in a wide variety of situations and deemed a substantially smaller number of situations matters of common knowledge. *See District of Columbia v. Hampton*, 666 A.2d 30, 35-36 (D.C. 1995); *Griggs v. Washington Metro. Area Transit Auth.*, 2002 WL 31174533 *4 (D.D.C.). Indeed, courts in this jurisdiction require expert testimony in relatively common situations. *See, e.g., Katkish v. District of Columbia*, 763 A.2d 703, 706 (D.C. 2000) ("[A]n average lay person is not capable of discerning when a leaning tree may create a dangerous situation requiring an emergency response and whether the likelihood of the tree falling is related to the condition of the tree, the street, or other circumstances."); *Messina v. District of Columbia*, 663 A.2d 535, 540 (D.C. 1995) (expert testimony necessary to establish standard of care in playground); *Lenkin-N Ltd. P'ship v. Nace*, 568 A.2d 474, 478 (D.C. 1990) (expert testimony on reasonableness of length of construction delay); *District of Columbia v. Freeman*, 477 A.2d 713, 719-20 (D.C. 1984) (expert testimony needed from traffic engineers or highway safety experts on dangers to pedestrians at an intersection). *Cf. District of Columbia v. Shannon*, 696 A.2d 1359, 1365 (D.C. 1997) (jury could apply "general duty of reasonable care" without expert testimony to point out danger from holes in playground equipment); *Jimenex v. Hawk*, 683 A.2d 457, 462 (D.C. 1995) (jury could use "common sense and everyday experience" to determine that fire likely when welding near a tank containing used motor oil).

Mr. Marshall's theories of liability against DCCC are that it had a duty to ensure the safety of persons attending the parade and that it was negligent in failing to properly plan, organize,

supervise, manage, inspect, and control the Parade.[9] Mr. Marshall's theories of liability against Sheppard are that it negligently operated, inspected, and prepared the tractor-trailer for the Parade.

Although there is no case on point, the reasoning of the District of Columbia Court of Appeals in *Hill v. Metro. African Methodist Episcopal Church*, 779 A.2d 906 (D.C. 2001) is informative. *Hill* examined whether an expert was needed to testify as to the standard of care for crowd control in a situation involving a large congregation exiting a church. The court held,

> [w]ithout the expert testimony of one familiar with such considerations, the jury would be left to sheer speculation as to various types of crowd control, what level of measures is generally accepted as reasonable in such circumstances, and the relation of such measures to possible mishaps in the exiting process. . . . The standard of care for crowd control in exiting large gatherings is indeed in our judgment, like that of the trial court, "beyond the ken of the average layperson."

Id. at 910 (citation omitted).

This Court has no doubt that an informed judgment regarding the standard of care and deviation from the standard of care in the planning, management and operation of an event such as the Parade requires an understanding of issues that are beyond the realm of common knowledge and everyday experience. Parades attract dense crowds of spectators, and involve numerous participants and moving vehicles. Management and control of such events are logistically complex, requiring extensive planning and preparation for, among other things, organization of performances, route planning for vehicular and pedestrian traffic, safety, emergencies, and other contingencies. This particular parade attracted 500,000 people in 2001 and involved 15-20 bands, each with at least

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[9] At the hearing on the motions to strike experts, Mr. Marshall withdrew his argument that expert testimony is not required in this case. Sheppard continues to argue that Mr. Marshall's expert should be stricken because, *inter alia*, no expert testimony is needed to assist the jury in understanding the conditions on the Sheppard truck.

twenty masqueraders. Expert testimony would assist the jury in determining whether either of the defendants was negligent and whether Mr. Marshall was contributorily negligent. Expert testimony would also assist a jury in determining whether there has been a deviation from the standard of care and whether that deviation contributed to the plaintiff's injuries. Therefore the parties could proffer experts to opine on issues relevant to liability in the planning, operation, and management of the Parade.

The Court is equally certain that it is consistent with the decisions of the District of Columbia courts to find that the proper maintenance, outfitting, and operation of a tractor-trailer in a parade is beyond the common understanding of "an average layperson." Accordingly, the parties could proffer expert testimony on issues relevant to liability on this issue, including the standard of care, breach of the standard of care and causation.

In fact, while Defendants may proffer expert testimony on these issues, Mr. Marshall as the plaintiff must proffer a qualified expert to satisfy his burden of proof because these issues are not matters of common knowledge. *See Hill*, 779 A.2d at 908.

B. *Are the Defense Experts Qualified?*

Federal Rule of Evidence 702 imposes a "special obligation upon a trial judge" to ensure that expert testimony is not only relevant, but reliable. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1998).[10] It is the province of a trial judge to act as a gatekeeper for expert

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[10] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data,

testimony. Thus, beyond determining relevance, a court must qualify the expert and make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

Mr. Marshall argues that Ms. Russell and Mr. Wilson are inappropriate expert witnesses because their opinions regarding parade safety are outside the scope of their expertise and their reports are not based on reliable principles or methodology. His argument is without merit.

Ms. Russell is a partner in a full service parade production company. She has dealt with more than fifty parades since her first involvement in the industry in 1983. She has drafted parade operations plans, provided on-site management, and addressed public safety issues common to parades. She planned and managed the Independence Day Parade in Atlanta (1983-2003), the Atlanta Christmas Parade (1991 - 2003), the Knoxville Dogwood Festival Parade (1999-2002), the Macon Cherry Blossom Festival Parade (1988, 2000, 2003), and the San Francisco Chinese New Year Parade (1996-2000). The Court finds that Ms. Russell has the "knowledge, skill, experience [and] training" to offer expert testimony on the standard of care for the planning, operations, and safety of parades.

Mr. Wilson has twenty-five years of experience as a police officer, including five as Chief of Police in the District of Columbia. He has taught courses related to police policies and procedures at American University and at the University of Maryland, and lectured at Pennsylvania

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> (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

State College and Southern Police Institute. He has testified as an expert in the federal courts of the District of Columbia, the Eastern District of Virginia, and Minnesota. He has also testified as an expert in state courts in Minnesota, Maryland, West Virginia, North Carolina, New Jersey, and Virginia, as well as the District of Columbia. During his tenure with the Metropolitan Police Department ("MPD"), he was the principal staff planner for a number of major events, demonstrations, and parades in the District of Columbia, including the 1963 Rally for Jobs and Freedom of Dr. Martin Luther King and the funeral of President John F. Kennedy. As a command officer, he also supervised coordination between parade sponsors and the MPD. The Court finds that Mr. Wilson has the "knowledge, skill, experience, training, or education" to testify concerning the standard of care for sponsors of parades in the District of Columbia and the roles of sponsors and the MPD in crowd control.

Mr. Marshall argues that the expert reports are not based on reliable principles or methodologies and the testimony should not be admitted under Federal Rule of Evidence 702. He correctly notes that the experts failed to provide detailed explanations of their reasoning or methodologies in their reports. However, any continuing foundational deficiency is attributable to Mr. Marshall's own conduct. Mr. Marshall failed to comply with the Court's orders regarding discovery of his expert. At Mr. Marshall's own suggestion, the Court selected the sanction for his discovery efforts by not permitting an extension of discovery so that he could depose the defense experts. Therefore, the pre-trial record as to the defense experts consists only of their extended resumes and expert reports. Absent his failure to comply with the Court's orders, Mr. Marshall would have had a full opportunity to test the adequacy of Ms. Russell's and Mr. Wilson's methodologies and reasoning; he cannot be heard to complain of "conclusory statements" now.

Pltf.'s Mot. to Strike at 13. Furthermore, as Mr. Marshall pointed out in his opposition to the motion to strike his own expert, the determination of reliability may focus upon the personal knowledge or experience of the expert. Pltf.'s Opp. to Mot. to Strike at 4. *See Groobert v. President and Directors of Georgetown Coll.,* 219 F. Supp. 2d 1, 7 (D.D.C. 2002) (personal experience can be the proper method for assessing reliability). The Court finds that DCCC has sufficiently demonstrated the extensive experience and personal knowledge of its experts and they may testify at trial.

C. *Is the Plaintiff's Expert Qualified?*

Mr. Marshall proffers the testimony of Paul Wertheimer, who is expected to testify that defendant D.C. Caribbean Carnival's failure to provide the necessary crowd control procedures was a breach of the standard of care, and that Sheppard breached its standard of care by maintaining and operating a tractor-trailer in an unsafe manner. Defendants challenge Mr. Wertheimer's credentials to testify as an expert concerning parades and the operation of eighteen-wheel trucks. The first objection is without merit. However, the Court agrees with Sheppard that Mr. Wertheimer gave no basis to find any expertise in operating a tractor-trailer and will strike his testimony in that regard.

DCCC argues that Mr. Wertheimer's own deposition testimony demonstrates that he cannot be an expert witness to set the standard of care for parade organizers.

> And I would assume, but I would have to research that there is a legal standard of care for organizers who run an event and invite the public as invitees or guests to their event, to provide reasonable care for the public, maybe plaintiff's attorney or you – plaintiff's attorney will put forward those legal requirements, but I'm confident they exist.

See DCCC Opp. to Pltf.'s Mot. to Strike Exh. 7 (Wertheimer Dep.) p. 61. These and a few other *bon*

mots in Mr. Wertheimer's deposition support DCCC's argument.[11] But a complete review of Mr. Wertheimer's deposition satisfies the Court that he has "knowledge, skill [and] experience" in crowd management that would assist the trier of fact to determine whether DCCC breached the relevant standard of care. Mr. Wertheimer's experience does not arise in the context of parades and that lack of experience could weaken his testimony. Nonetheless, this is a matter to be developed through cross-examination, and does not discredit his initial standing as an expert in crowd management. The trier of fact would be assisted by expert testimony on this issue. The applicable standard to which Mr. Wertheimer would testify is "reasonable care, doing the prudent thing as an organization, in order to provide reasonable care for the public." Wertheimer Dep. p. 105.

Conversely, Mr. Wertheimer has no background, experience, training, education, or skill to testify to the standard of care for the use of tractor-trailers as parade floats. Instead, he testified that "as a licensed driver of a vehicle, I think I can make a comment on the general equipment that should be available to a vehicle for safe – for safe driving." *Id.* p. 130. He added

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[11] For instance, Mr. Wertheimer explained that "[c]rowd control is not what – is really not my special area. Crowd management is my special area and there is a difference . . . [P]olice generally practice or law enforcement or authorities similar to that generally practice crowd control . . . . Crowd management has a psychological aspect . . . that addresses more of designing an environment." Wertheimer Dep. pp. 15-16.

At the end of his deposition, the following questions and conflicting answers occurred:

> Q. You hold yourself out to be an expert in crowd management, correct?
> A. Yes, and crowd control. I mean, in general, I understand them. There is a difference in the purpose of them or what they are trying to attain.
> Q. Do you hold yourself out to be an expert in both crowd management and crowd control?
> A. Sure, yes.

Id. p. 149

that "[y]ou don't have to be trained" to testify concerning truck safety because the standards "are written in a way that the general public can understand that." *Id.* p. 133. Mr. Wertheimer concedes that he is not an expert. His opinion, therefore, is merely a layperson's opinion and is not admissible. *See Nat'l Tel. Coop. Assoc. v. Exxon Mobil Corp.*, 244 F.3d 153, 154-55 (D.C. Cir. 2001) (the mere personal opinion of the testifying expert as to what the expert would do in a particular situation is insufficient). Mr. Wertheimer is stricken as an expert on the operation of tractor-trailers.

MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). To determine if a fact is material, a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Any factual dispute must be capable of affecting the substantive outcome of the case to be "material" and "genuine." *See Anderson*, 477 U.S. at 247-48. In determining whether a genuine issue of material fact exists, the court must view all facts and reasonable inferences in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

A party opposing summary judgment "may not rest upon the mere allegations of denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248. The moving party is entitled to summary judgment against

"'a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Waterhouse v. District of Columbia*, 298 F.3d 989, 992 (D.C. Cir. 2002) (quoting *Celotex Corp.*, 477 U.S. at 322).

A. *Failure to Proffer Expert Witness*

Where a matter is so distinctly related to a science, profession, or other specialized field as to be beyond the ken of the average layperson, the plaintiff must designate an expert to provide testimony on the standard of care in order to avoid summary judgment. *Hill*, 779 A.2d at 910. *See also District of Columbia v. White*, 442 A.2d 159 (D.C. 1982) (reversing trial court's decision to permit negligent supervision claim to go to jury because no expert proffered); *Parker v. Grand Hyatt Hotel*, 124 F. Supp. 2d 79, 89-90 (D.D.C. 2000) (not permitting negligent supervision claim without expert testimony). As an initial matter, Mr. Marshall cannot prevail unless he can prove all the elements of his allegations, including the applicable standard of care. Mr. Marshall offers no expert testimony to support his case that Sheppard maintained and operated its tractor-trailer in an unsafe manner. Because he does not have an expert to testify, and because the case requires an expert to set the standard of care, summary judgment must be entered in Sheppard's favor. *See Hill*, 779 A.2d at 910 ("Because appellant did not designate an expert to testify, the trial court properly entered summary judgment in favor of the appellees.").

B. *Contributory Negligence*

A contributorily-negligent claimant is completely barred from recovery.[12] *Lynn v.*

[12] The substantive tort law of the District of Columbia controls. *Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998) (citing *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 553 (D.C. Cir. 1993). *See Loughlin v. United States*, 209 F. Supp. 2d 165 (D.D.C. 2002) (negligence is a question of state law).

District of Columbia, 734 A.2d 168, 172 (D.C. 1999) (citing *George Washington Univ. v. Waas*, 648 A.2d 178, 180 (D.C. 1994)); *Elam v. Ethical Prescription Pharmacy, Inc.*, 422 A.2d 1288, 1289 n.2 (D.C. 1980). *See* 57 AM. JUR. 2D NEGLIGENCE § 708 (2004) (plaintiff's contributory negligence bars any recovery if the failure to use ordinary care was the proximate cause of plaintiff's injuries). Negligence and contributory negligence are usually questions of fact that are appropriately resolved by a jury. *District of Columbia v. Brown*, 589 A.2d 384, 388 (D.C. 1991) (citing *Aqui v. Isaac*, 342 A.2d 370, 371 (D.C. 1975)). But where the material facts are undisputed and, conceding every legitimate inference, there is only one reasonable conclusion, the issue is one of law for the court. *Washington Metro. Area Transit Auth. v. Jones*, 443 A.2d 45, 50 (D.C. 1982) ("It is only in a case where the facts are undisputed and, considering every legitimate inference, only one conclusion may be drawn, that the trial court may rule as a matter of law on negligence, contributory negligence or proximate cause."). *See Poyner v. Loftus*, 694 A.2d 69, 70-71 (D.C. 1997) (same).[13]

Defendants argue that Mr. Marshall's contributory negligence should bar recovery. They argue that he was negligent *per se* because his injuries were proximately caused by violation of a statute that was designed to prevent such injuries. In addition, Defendants maintain that Mr. Marshall had a duty to "exercise reasonable care for protection of his own safety" and that his conduct under the circumstances was negligent. DCCC Mot. for Sum. Judg. at 22.

Mr. Marshall contends that material disputed issues remain, making this case inappropriate for summary judgment. Further, he argues that Defendants have not proven

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[13] Although "[o]nly in the exceptional case is evidence so clear and unambiguous that contributory negligence should be found as a matter of law," *Tilghman v. Johnson*, 513 A.2d 1350, 1351 (D.C. 1986), if the defendant establishes by a preponderance of the evidence that the "plaintiff failed to exercise reasonable care," summary judgment is appropriate. *Poyner*, 694 A.2d at 71.

contributory negligence because one statute governing alcohol consumption, D.C. Code § 25-1001, was not in effect during the parade and cannot be used to determine contributory negligence *per se*, and because Defendants have not proven a causal link between the alcohol consumption and Mr. Marshall's injury. Mr. Marshall's arguments are not persuasive.

There is a rebuttable presumption of negligence where a party violates a statute and the violation is a proximate cause of an injury that the statute was designed to prevent. *Robinson v. District of Columbia*, 580 A.2d 1255, 1256 (D.C. 1990). Mr. Marshall argues that the law prohibiting the drinking of alcohol in certain public areas was not in effect during the Parade. The evidence in the record is inconclusive as to whether D.C. Code § 25-1001(a), which prohibits drinking alcohol on streets, in alleys, parks and on sidewalks,[14] was in force on June 23, 2001. Therefore, although violation of this statute may be evidence of contributory negligence, it is not sufficient to establish negligence *per se*. Importantly, however, Mr. Marshall ignores a subsection of that same D.C. Code section. D.C. Code § 25-1001(c) states that "[n]o person, whether in or on public or private property, shall be intoxicated and endanger the safety of himself, herself, or any other person or property." D.C. Code § 25-1001(c). An intoxicated person who endangers himself is guilty of a misdemeanor and can be fined or jailed. *See* D.C. Code § 25-1001(d). Mr. Marshall violated this code provision.

A blood alcohol level of 0.05 percent or more is *prima facie* evidence of being under the influence of alcohol. *Belton v. Washington Metro. Area Transit Auth.*, 20 F.3d 1197, 1199 (D.C. Cir. 1994). Mr. Marshall concedes that he drank alcohol during the hours preceding his accident,

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[14] D.C. Code § 25-1001(a) states, in part, "no person in the District shall drink an alcoholic beverage or possess in an open container an alcoholic beverage in or upon any of the following places: (1) A street, alley, park, sidewalk, or parking area."

and does not dispute that he had a blood alcohol content of 0.10 percent. *See* Pltf.'s Opp. to Mot. for Sum. Judg. at 17 ("Many of the people attending the carnival drank alcoholic beverages, including Ronald Marshall."). In addition to alcohol, Mr. Marshall had detectable amounts of other drugs in his blood.

While under the influence of drugs and alcohol, Mr. Marshall slipped by a police officer (who was using his bicycle to keep the crowd from the floats), the numerous spotters (accompanying the float), and Brian Williams (who had gotten out of the truck to spot-check along the length of the truck and flatbed). He then attempted to climb onto an eighteen-wheel truck that had stopped and started at regular intervals during the parade. By doing so, Mr. Marshall endangered his own safety and contributed to his injuries. The statutory purpose of Section 25-1001(d) is evident: to prevent alcohol-related injuries. Under the circumstances, Mr. Marshall's violation of Section 25-1001(d) constituted negligence *per se*.

Even if the Court were to find that a violation of Section 25-1001(d) was not negligence *per se*, the vast weight of the evidence demonstrates that Mr. Marshall failed to exercise reasonable care to ensure his own safety. Mr. Marshall voluntarily placed himself in an obvious position of danger by trying to climb onto a float while intoxicated. He did so in an area that was invisible to the driver and without regard to the individuals attempting to keep the crowd away from the float. These facts admit only one conclusion: Mr. Marshall's conduct was negligent.

Mr. Marshall attempts to derail a finding of contributory negligence by arguing that Defendants have not proven causation. He claims that the alcohol and other drugs that were in his

system did not impair him mentally or physically.[15] This claim is without merit. His toxicology expert Dr. Jesse Bidanset concedes a blood alcohol content of 0.10 is "mild intoxication," Pltf.'s Opp. to Mot. for Sum. Judg. Exh. G (Bidanset Dep.) at 43, but opined that it would not affect Mr. Marshall's ability to climb a motionless float because "it's an activity that doesn't require a great deal of divided attention, and so it doesn't stress the various central nervous system effects of alcohol." *Id.* at 44.[16] But when asked if the alcohol in his blood would have impaired Mr. Marshall's judgment, Dr. Bidanset was evasive and non-responsive: "what aspect of judgment would be required of an individual walking in a parade?" *Id.* The doctor's reliance on this distinction is misplaced. The judgment at issue was not "walking in a parade." It was the decision to: 1) climb onto an eighteen-wheel tractor-trailer float; 2) by way of a high step located between the tractor and the trailer; 3) in an area out of the driver's sight; 4) not knowing how long the truck might remain stationary; 5) while holding an alcoholic beverage in one hand; and 6) avoiding both Officer Hays's and Mr. Williams's efforts to prevent persons in the audience from getting too close.[17] His decision was negligent and the proximate cause of his injuries.

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[15] His toxicology expert, Dr. Jesse Bidanset, contends that Mr. Marshall's level of intoxication would not have impaired simple functions such as walking. Pltf.'s Opp. to Mot. for Sum. Judg. Exh. G (Bidanset Dep.) p. 43-45. Dr. Bidanset acknowledges, however, that Mr. Marshall would not have been able to drive safely. *Id.*

[16] There is some uncertainty as to whether the truck had started to pull away before Mr. Marshall attempted to climb up on it. The police report indicates the truck was moving. Mr. Marshall asserts that it was still when he put his foot on the step and then started moving.

[17] Mr. Marshall asserts that "[o]ne spotter, Brian Williams, was four to five fee away and merely had to turn his head." Plaintiff Ronald Marshall's Statement of Material Facts That Are In Dispute ¶ 7. The float also had eight spotters provided by the Knock Boyz keeping people away from the truck, *see* DCCC Reply on Mot. for Sum. Judg. Exh. 5 (Davidson Dep.), pp. 10 & 12, and people with poles on the flatbed to tell anyone trying to climb aboard to stay away. Sheppard Reply on Mot. for Sum. Judg. at 4; *Id.* Exh. 1 (Phillips' Dep.) pp. 27-28.

The Court finds that, on the undisputed facts, Mr. Marshall's consumption of alcohol and attempts to mount a parade float were contributorily negligent as a matter of law.

C. *Last Clear Chance*

Although contributory negligence normally bars recovery, the "last clear chance" doctrine allows a negligent plaintiff to recover damages if the defendant had the opportunity to recognize and avoid injury to the plaintiff. *See Jones*, 443 A.2d at 50 ("Even if we hold that [plaintiff] was contributorily negligent as a matter of law . . . the negligence does not bar her right to recover where the bus driver had a last clear chance to avoid the accident."). Courts in the District of Columbia apply a four-part test to determine whether a defendant had the "last clear chance" to avoid injury to a plaintiff.

> (1) [T]he plaintiff was in a position of danger caused by the negligence of both plaintiff and defendant; (2) . . . the plaintiff was oblivious to the danger, or unable to extricate himself from the position of danger; (3) . . . the defendant was aware, or by the exercise of reasonable care should have been aware, of the plaintiff's danger and of his oblivion to it or his inability to extricate himself from it; and (4) . . . the defendant, with means available to him, could have avoided injuring the plaintiff after becoming aware of the danger and the plaintiff's inability to extricate himself from it, but failed to do so.

Robinson v. District of Columbia, 580 A.2d at 1258.

Mr. Marshall argues that DCCC "possibly" had the last clear chance to avoid the injury.[18] He argues that: 1) "[n]egligence has been demonstrated by both defendants;" 2) Mr.

[18] The Court has granted Sheppard's motion for summary judgment because Mr. Marshall failed to proffer an expert on the standard of care for the operation of a tractor-trailer. Absent this failure to proffer an expert, the Court would nevertheless find that Mr. Marshall's contributory negligence bars recovery against Sheppard and that the last clear chance doctrine would not apply to Sheppard. The four-part test requires that the plaintiff be in a position of danger caused by both the plaintiff and defendant's negligence. Mr. Marshall was not in a position of danger caused by his own negligence and that of Sheppard. Mr. Marshall asserts that

Marshall "did not know he was in danger and, once the danger manifested itself, he was quite literally 'unable to extricate [himself]'" from the peril; 3) DCCC officials could have "discovered Mr. Marshall and warned him" as he stood "in the open waiting his chance to climb aboard the truck; and 4) DCCC officials "would have had ample time to see Mr. Marshall" prior to his climbing aboard the truck. Pltf.'s Opp. to Mot. for Sum. Judg. at 37. Mr. Marshall's reliance on this doctrine is misplaced.

"'It is not the right of every injured party who has been contributorily negligent to seek the aid of the doctrine of last clear chance . . . .'" *Felton v. Wagner*, 512 A.2d 291, 296 (D.C. 1986) (citing *Phillips v. D.C. Transit System, Inc.*, 198 A.2d 740, 742 (D.C. 1964). Rather, it is a "narrow exception to the rule barring recovery when there is contributory negligence . . . ." *Washington Metro. Area Transit Auth. v. Young*, 731 A.2d 389, 394 (D.C. 1999).

A plaintiff may recover if he can demonstrate that the defendant had a "superior opportunity" to avoid the injury, where the "defendant could, and the plaintiff could not, avoid the accident." *Young*, 731 A.2d at 394 (internal quotations and citations omitted). The doctrine does not apply if the emergency is sudden because the defendant is not required to act instantaneously. *Felton*, 512 A.2d at 296.

Mr. Marshall evaded a police officer and multiple spotters when he attempted to climb aboard the truck. He was injured when he "placed his right foot onto the step and began to

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the truck was stopped when he attempted to mount the trailer. Accordingly, when he first placed himself in a position of danger, there was no antecedent negligence on the part of Sheppard. *Belton*, 20 F.3d at 1200-01 (requiring antecedent negligence by the defendant). There is also no dispute that Christopher Bennett, the driver of the truck, was unaware of Mr. Marshall's presence and only moved the truck after being directed to do so by a D.C. police officer. Under these circumstances, the doctrine of last clear chance does not salvage Mr. Marshall's claims, and recovery would be barred.

hoist himself onto the trailer. As he did, the truck suddenly lurched forward." Pltf.'s Opp. to Mot. for Sum. Judg. at 19. *See also* Pltf.'s Mot. to Strike at 8 ("The sudden movement of the truck occurred just as Mr. Marshall placed his weight onto the step."). As soon as "the danger manifested itself," Mr. Marshall claims he was unable to extricate himself from the peril because he was "literally" trapped under the truck's wheels. Mr. Marshall describes an emergency that arose suddenly and would have required instantaneous action to prevent his injuries. To prevent the injury to Mr. Marshall, DCCC would have had to recognize and react to Mr. Marshall's fall under the truck as it occurred. The doctrine of last clear chance does not demand such instantaneous action, and this Court will not find it here. *See* 57 AM. JUR. 2D NEGLIGENCE § 901 (2004)("the doctrine is not implicated when the plaintiff's negligence continues until the moment of the accident or is otherwise concurrent with the defendant's negligence.").

To overcome this doctrinal restriction, Mr. Marshall seeks to enlarge the time in which DCCC, "by the exercise of reasonable care," could have become aware of the danger. He argues that DCCC officials could have observed him standing and waiting to board the truck and warned him of the danger. This argument merely realleges, in another form, the initial charge of negligence: that DCCC failed to "provide for [his] safety," and failed to organize and conduct the parade in a manner consistent with the standard of care. Pltf.'s Opp. to Mot. for Sum. Judg. at 9-10. To invoke the last clear chance doctrine, a plaintiff must demonstrate a "*second negligent act or omission*" and some "later negligence alone [that] proximately caused plaintiff's injury." *Hall v. Carter*, 825 A.2d 954, 958 (D.C. 2003) (emphasis in original). Mr. Marshall has not alleged a second negligent act, and his argument must fail. *Accord* RESTATEMENT (SECOND) OF TORTS § 479 cmt. h (1965) (defendant is not liable where his lack of antecedent preparation prevents him from

discovering plaintiff's situation because his negligence is not later in time than that of the plaintiff).

CONCLUSION

The Court concludes that Plaintiff's expert witness, Paul Wertheimer, is not qualified as an expert on the operation of eighteen-wheel trucks. Without expert testimony, Mr. Marshall cannot establish negligence and summary judgment must be entered in Sheppard's favor. In addition, because Plaintiff's negligence bars recovery and because DCCC had no last clear chance to avert the injury to Mr. Marshall, DCCC's motion for summary judgment is granted. A separate order accompanies this memorandum opinion.

DATE: October 26, 2004.

/s/
ROSEMARY M. COLLYER
United States District Judge